

<p><b>This Opinion is Not a Precedent of the TTAB</b></p>
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Nutritional Concepts, Inc.*

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Serial No. 76715478

Robert A. Vanderhye for Nutritional Concepts, Inc.

Laurie Mayes, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

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Before Kuhlke, Wolfson and Hightower,  
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Nutritional Concepts, Inc. (“Applicant”) seeks registration on the Principal  
Register of the mark NUTRITIONAL CONCEPTS (in standard characters) for

Retail and wholesale on-line and store services featuring  
dietary and nutritional supplements in International  
Class 35;

Personalized nutritional counseling services in  
International Class 44.<sup>1</sup>

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<sup>1</sup> Application Serial No. 76715478 was filed on December 2, 2013, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as 1985 (Class 44) and 1998 (Class 35).

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that when used with the recited services, Applicant's mark so resembles the mark NUTRITION CONCEPTS for "nutrition counseling services" in International Class 42<sup>2</sup> that confusion, mistake or deception among relevant purchasers is likely to result. After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

Registration was also refused on the ground that the recitation of services in Class 35 is indefinite. In her Brief, the Examining Attorney indicates that the requirement is now "moot"<sup>3</sup> because Applicant agreed to amend the recitation to "retail and wholesale store services, including online store services, featuring dietary and nutritional supplements," contingent upon its prevailing on the Section 2(d) refusal. However, Applicant, in its brief, argues that the present recitation of services is definite. Accordingly, we treat the requirement as maintained. We hold that the present recitation is not indefinite. It sufficiently describes the nature of the services as being retail and wholesale store services, including those provided online. The requirement for a more definite statement is reversed.<sup>4</sup>

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<sup>2</sup> Registered October 17, 1989 on the Principal Register in typed form; renewed. Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings.

<sup>3</sup> Examining Attorney's Brief, 4 TTABVue at 4, n. 1.

<sup>4</sup> The Board strongly encourages resolution of issues involving identifications of goods or services prior to final decision. If there was agreement, either Applicant or the Examining Attorney could have requested that the Board suspend the appeal and remand the application for entry of the amendment. Trademark Rule 2.142(d). Lacking agreement, the contingent amendment to Applicant's recitation of services could not have been entered following our final decision on the application, regardless of the outcome on the Section 2(d)

## I. Likelihood of Confusion

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

## II. The Marks

Applicant’s mark is NUTRITIONAL CONCEPTS. The registered mark is NUTRITION CONCEPTS. The marks look and sound alike because they are similarly constructed of two words, the final word being identical, and the first word of each mark being formed from the same root, “nutrition.” The marks are also

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refusal. Once an application has been considered and decided on appeal it will not be reopened except for the entry of a disclaimer or upon order of the Director. See Trademark Rule 2.142(g). Thus, to the extent there is a request for a contingent remedy to allow Applicant to amend the recitation of services if the Board should reverse the refusal of registration, such is not possible under the rules, and is denied. Moreover, to the extent we are being asked to consider the substantive refusal in light of two possible recitations, this is likewise not appropriate; the Board does not entertain contingent identifications of goods/services but decides substantive refusals on the basis of a single identification. Even now, during the pendency of the appeal, the requirement could have been “moot” only if it had been withdrawn or complied with.

similar in connotation and overall commercial impression. The dictionary evidence submitted by the Examining Attorney shows that “nutritional” is the adjectival form of “nutrition,” a noun that mean “the process of nourishing or being nourished, especially the process by which a living organism assimilates food and uses it for growth and for replacement of tissues.”<sup>5</sup> Although “nutrition” is technically the nominative form, in the registered mark the word “nutrition” acts as an adjective, modifying the word “concepts.” Thus, the words are essentially interchangeable in meaning due to the construction of the registered mark.

Applicant’s argument that someone seeking counseling services would never use “nutritional” to convey the meaning of food that keeps one healthy, is misplaced.<sup>6</sup> Although the reference from the MacMillan Dictionary defines “nutrition” as, *inter alia*, “food considered as something that keeps you healthy,” it further defines “nutritional” as “concerning food as something that keeps you healthy.”<sup>7</sup> In comparing Applicant’s mark with the registered mark, it is clear they look alike, sound alike, have the same connotation and engender the same overall commercial impressions. The first *du Pont* factor strongly favors a finding of likelihood of confusion.<sup>8</sup>

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<sup>5</sup> At <https://education.yahoo.com>, attached to final Office Action of August 13, 2014.

<sup>6</sup> Brief at 10.

<sup>7</sup> At <http://www.macmillandictionary.com>, attached to final Office Action of August 13, 2014.

<sup>8</sup> Applicant’s reliance on *Seven-Up Co. v. Tropicana Products, Inc.*, 142 USPQ 384 (TTAB 1964), *aff’d* 356 F.2d 567 (CCPA 1966), is misplaced. There, the marks SUN-UP and SEVEN-UP presented entirely different connotations. Applicant also argues that the marks TRANXITION and TRANXIT were at one time both registered for computer software, and that other pairs of marks allegedly found dissimilar (which were referenced during

### III. The Services and their Trade Channels

We note at the outset that when the marks at issue are identical or highly similar, as is the case herein, the respective goods or services “need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks.” *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981). *See also Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Our determination of whether the services are so closely related that confusion is likely is made based upon the specific services as recited in the application and in the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (*citing Octocom Systems, Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990)). The services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that they are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or

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prosecution of the TRANXITION mark by the applicant therein) should bear on our decision herein. None of the marks involved in those cases were as close as the subject marks are to each other, and the relevant goods therein were entirely different (cosmetics, clothing, shoes). Suffice it to say, the Board is not bound by the actions of prior examining attorneys, nor are we privy to the facts or record of previous court actions or TTAB proceedings. Each case must stand on its own record. *See, e.g., In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

that there is an association between them. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicant seeks to register its mark for “retail and wholesale on-line and store services featuring dietary and nutritional supplements” and for “personalized nutritional counseling services.” The cited mark is registered for “nutrition counseling services.” Turning first to the counseling services, because there are no limitations or restrictions reflected in Registrant’s recitation of services, its counseling services are presumed to include such services of all types, including “personalized” counseling. Thus, Registrant’s services in Class 42 are legally identical to Applicant’s services in Class 44.<sup>9</sup> Further, with regard to the channels of trade and classes of purchasers, because the services are legally identical and there are no restrictions as to trade channels or purchasers, we must presume that the services would be sold in the same channels of trade and to the same relevant purchasers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (the Board may rely on this legal presumption in determining likelihood of confusion); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Finally, we compare the services as they are identified in the registration and application, and not how they may be rendered in the marketplace.

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<sup>9</sup> The fact that the marks are registered in different international classes is not controlling. At the time the registered mark issued (in 1989), “nutritional counseling” was included in Class 42. The Office restructured Class 42 in 2001, creating Class 44 for services provided by members of medical professions such as doctors, veterinarians and psychoanalysts. Counseling services are presently classified in Class 44.

*In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). See also *Hewlett-Packard*, 62 USPQ2d at 1004; *Octocom Systems*, 16 USPQ2d at 1787. Applicant's argument that "*personalized* nutrition counseling services are different than nutrition counseling services in general"<sup>10</sup> is unavailing. Applicant has not shown any special significance to the meaning of the term "personalized" that would fail to be attributable to nutrition counseling "in general" or that nutrition counseling in general does not involve a personal element.

Accordingly, the second and third *du Pont* factors favor a finding of likelihood of confusion in Class 44.

In Class 35, the Examining Attorney has submitted numerous third-party registrations to show that store services featuring dietary supplements are related to nutritional counseling services.<sup>11</sup> The following are a representative sample:

Reg. No. 3654460 for the mark WELLNESSMART for, *inter alia*, retail store services featuring vitamins and supplements; nutrition counseling;<sup>12</sup>

Reg. No. 3848600 for the mark THE NEW WELL for, *inter alia*, retail store and on-line retail store services featuring...dietary and nutritional supplements; nutrition counseling;<sup>13</sup>

Reg. No. 3431095 for the mark DIVINE HEALTH for, *inter alia*, online retail store services featuring nutritional supplements; nutrition counseling;<sup>14</sup>

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<sup>10</sup> Brief, at 10, 1 TTABVUE at 10.

<sup>11</sup> First 4 from first Office Action, remainder from final.

<sup>12</sup> Registered July 14, 2009.

<sup>13</sup> Registered September 14, 2010.

<sup>14</sup> Registered May 20, 2008, Sections 8 and 15 combined declaration has been accepted and acknowledged.

Reg. No. 3570775 for the mark SURACELL for, *inter alia*, dietary and nutritional supplements; distributorship, retail and online retail store services featuring...dietary and nutritional supplements and vitamins; dietary and nutritional counseling;<sup>15</sup>

Reg. No. 3394959 for the mark LIFE EXTENSION for, *inter alia*, retail store services featuring nutritional and dietary supplements; counseling in the field of nutrition;<sup>16</sup>

Reg. No. 4467303 for the mark LIFE EXTENSION FOUNDATION FOR LONGER LIFE for, *inter alia*, on-line retail and retail store services featuring nutritional and dietary supplements; counseling services in the fields of health, nutrition and lifestyle wellness;<sup>17</sup>

Reg. No. 3983872 for the mark MINDFUL ORGANICS for, *inter alia*, online retail store services featuring organic vitamins, organic nutritional supplements; personal consultation services in the field of nutrition;<sup>18</sup> and

Reg. No. 4136419 for the mark CARPEVITA for, *inter alia*, retail store and on-line retail store services featuring...nutritional supplements; nutrition counseling.<sup>19</sup>

Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). While they are not evidence that the marks have been used or encountered

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<sup>15</sup> Registered February 3, 2009.

<sup>16</sup> Registered March 11, 2008, Sections 8&15 affidavit accepted and acknowledged.

<sup>17</sup> Registered January 14, 2014.

<sup>18</sup> Registered June 28, 2011.

<sup>19</sup> Registered May 1, 2012.



by the public, the registrations have probative value to the extent that they serve to suggest that the identified goods are products which are produced or marketed by a single source under a single mark.

In further support of her position, the Examining Attorney has also furnished website evidence, including the following, of online companies that offer nutritional counseling services on the one hand, and dietary and nutritional supplements on the other, under the same marks:

1. Kalunga Wellness offers “Re-building/Cleansing” packages that include nutritional counseling, as well as “natural energy flow” capsules.<sup>20</sup>
2. Nutrition For Life advertises chewable chocolate wafers to curb one’s appetite, supplements for immune support, and “nutrition counseling” services described as providing information on “nutritional supplements and health.”<sup>21</sup>
3. Weight and Wellness offers “supplements” and “nutrition counseling.”<sup>22</sup>
4. At the Maureen Stewart Nutrition website, Maureen Stewart endorses a brand of vitamins, Pioneer Nutritional formulas, and she also gives nutritional advice.<sup>23</sup>

Applicant’s argument that the third-party uses and registrations are irrelevant, because the owner of the cited registration has never sold dietary or nutritional supplements online or in retail outlets, is not persuasive. The evidence in this case shows that companies, including Applicant, that provide nutritional counseling also operate stores through which nutritional or dietary supplements are sold. That the

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<sup>20</sup> At <http://kalungawellness.com>, attached to final Office Action August 13, 2014.

<sup>21</sup> At <http://www.nutritionforlife.com>, *id.*

<sup>22</sup> At <http://www.weightandwellness.com>, *id.*

<sup>23</sup> At <http://www.maureenstewartnutrition.com>, *id.*

Registrant allegedly has not done so to date does not overshadow this evidence of relatedness and overlapping trade channels. The second and third *du Pont* factors support a finding of likelihood of confusion with respect to Class 35.

#### IV. Actual Confusion

Applicant argues that its mark has been in use for 29 years, during which time it has co-existed with the registered mark without a single reported instance of actual confusion. Applicant contrasts this with a “real world situation with respect to the sale of nutritional supplements” by an unrelated third party where there have been instances of actual confusion due to the third-party’s alleged use of the mark NUTRITIONAL CONCEPTS.<sup>24</sup>

In an *ex parte* case, the absence of actual confusion is not unusual and seldom is a significant factor in finding that there is no likelihood of confusion as it is usually impossible to determine whether there has been any significant opportunity for actual confusion to have occurred. “The lack of evidence of actual confusion carries little weight, especially in an *ex parte* context.” *Majestic Distilling Co.*, 65 USPQ2d at 1205. Moreover, while we have statements from two of Applicant’s officers (co-founder, Bonnie C. Minsky, and treasurer Steven A. Minsky) stating that they have never encountered any instances of actual confusion despite extensive exposure, there is nothing in the record to corroborate the actual extent of public exposure to either Applicant’s or Registrant’s marks, nor any evidence confirming that Applicant has been successful in its marketing of services under the

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<sup>24</sup> Brief, p. 6, 1 TTABVue at 6.

NUTRITIONAL CONCEPTS mark at any time, let alone sustained success since 1985. “[U]ncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *Id.* The fact that there is another company that is apparently using the mark NUTRITIONAL CONCEPTS and with which Applicant is being confused in the marketplace is irrelevant to the question of whether Applicant’s mark and the registered mark are confusingly similar. The Board has no way to know whether Registrant is unaware of any instances of actual confusion between the marks at issue herein.

Accordingly, although we have considered Applicant’s declarants’ statements in reaching our decision herein, we find that this factor does not outweigh the other relevant *du Pont* factors pointing to likely confusion.

The *ex parte* cases upon which Applicant relies are inapposite. *In re General Motors*, 23 USPQ2d 1465 (TTAB 1992), involved a “confluence of facts” that led the Board to consider the apparent lack of actual confusion as a relevant factor. In *General Motors*, the applicant’s mark “achieved a degree of renown” due to applicant’s sustained marketing success; the registrant’s mark was considered weak (GRAND PRIX), entitled to a lesser scope of protection; and the goods in that case were automobiles, typically major and expensive purchases for most consumers. A similar “confluence of facts” does not exist in this case. Applicant’s services have not been shown to be expensive. The record does not support a finding of extensive sales or marketing of Applicant’s services such that we can determine it to have enjoyed “sustained success.” The fact that Registrant here is not expanding its product line

(as acknowledged by Applicant) stands in sharp contrast to the registrant in *General Motors*. See *General Motors*, 23 USPQ2d at 1471. The court in *In re Myers*, 201 F.2d 379, 96 USPQ 238 (CCPA 1953), also relied upon by Applicant, made it clear that while it was deciding an *ex parte* case, the case was a continuation of an earlier cancellation action that involved the applicant's same mark. The court grounded its discussion of the parties' twenty year co-existence within this framework, explaining that "no registration should be cancelled hastily and without a most careful study of all the facts." 96 USPQ at 242. Nevertheless, in holding that confusion was unlikely, the court relied primarily on the differences in the goods (medicine for controlling worms in dogs and dandruff shampoo for humans) and the marks (although both involved the same literal element, SURE SHOT, the applicant's mark had a distinctive additional design element). As for the third case relied on by Applicant, *Hubbard Feeds Inc. v. Animal Feed Supplement Inc.*, 51 USPQ2d 1373 (8th Cir. 1999), the court of appeals therein affirmed the district court's denial of a preliminary injunction on the ground that plaintiff committed laches. Laches applies when a claimant inexcusably delays in asserting its claim and thereby unduly prejudices the party against whom the claim ultimately is asserted. The issue before the court was whether plaintiff had unreasonably delayed filing a complaint against a competitor who had built up its business for over twenty years with plaintiff's knowledge. Here, there is no showing that Registrant has any knowledge of Applicant's asserted activities under its mark.

After considering Applicant's arguments and evidence and the relevant *du Pont* factors, including those not specifically discussed above, we find that because the marks are similar, the services are legally identical or closely related, and the channels of trade and consumers overlap, confusion is likely between Applicant's mark NUTRITIONAL CONCEPTS and Registrant's mark NUTRITION CONCEPTS.

**Decision:** The refusal to register Applicant's mark NUTRITIONAL CONCEPTS under Section 2(d) is affirmed in both Classes 35 and 44.